**Aim Royal Insulation, Inc. and Jacobson Staffing, L.C. *and* International Association of Heat & Frost Insulators & Allied Workers, AFL–CIO, Local No. 73.** Cases 28–CA–022605 and 28–CA–022714

July 30, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

The primary issues in this case are whether the judge correctly dismissed two sets of unfair labor practice allegations: that Aim Royal Insulation violated Section 8(a)(3) and (1) by refusing to hire or consider for hire union-affiliated applicants Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback, and that Aim and Jacobson Staffing, acting as joint employers, violated Section 8(a)(3) and (1) by refusing to hire or consider for hire union-affiliated applicants Shawn McMillan, Luis Bolaños, and Gustavo Gonzalez.[1] For the reasons stated below, we reverse the judge and find these violations.[2] We discuss these issues in turn, after briefly addressing other, subsidiary findings.

## I. BACKGROUND

The allegations in this case arose out of the efforts of International Association of Heat & Frost Insulators & Allied Workers, AFL–CIO, Local No. 73 to organize Aim, which is engaged in the construction and repair of commercial insulation systems in Phoenix, Arizona. As fully set forth in the judge's decision, the Union, in 2008, devised a plan to send organizers and union-represented employees to apply for jobs with Aim and with Jacobson, which was under contract to recruit and provide temporary employees to Aim. The various incidents giving rise to the allegations occurred from May 2008, when union organizer Jose Gurrola initially applied for a job with Aim, through July 2009.[3] Nearly all of the allegations involved the Respondents' handling of the union applicants.[4]

## II. THE JUDGE'S SUBSIDIARY FINDINGS

We agree with the judge, for the reasons set forth in his decision, that Aim violated Section 8(a)(3) and (1) by refusing to hire or consider for hire Shawn McMillan in July. We also agree with the judge's findings that Jacobson did not violate Section 8(a)(3) and (1) by refusing to hire or consider for hire McMillan in June; and that Aim and Jacobson, acting as joint employers, did not violate 8(a)(3) and (1) by refusing to hire or consider for hire Aizu in July.[5]

[1] On May 21, 2010, Administrative Law Judge William G. Kocol issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, Respondents Aim and Jacobson each filed answering briefs, and the Acting General Counsel filed reply briefs. Respondent Aim filed cross-exceptions and a supporting brief, the Acting General Counsel filed an answering brief and Aim filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[2] No exceptions were filed to the judge's findings that Aim violated the Act by: (1) maintaining overly broad work rules; (2) coercively interrogating Shawn McMillan; and (3) refusing to hire or consider for hire Jose Gurrola. In addition, no exceptions were filed to the judge's findings that Jacobson violated the Act by: (1) telling McMillan that he would not be hired because of his union status; (2) coercively interrogating McMillan; and (3) telling Bolaños and Chavez that they lost employment opportunities because of their support for the Union. Finally, no party has excepted to the judge's dismissal of the allegations that: (1) Aim unlawfully created an impression of surveillance; and (2) Jacobson coercively interrogated Angel Aizu.

The Acting General Counsel and Aim have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates herein are in 2009 unless otherwise stated.

[4] The judge found that Aim did not violate Sec. 8(a)(3) and (1) by refusing to reinstate Gurrola in April when he made an unconditional offer to return to work after going on strike. The Acting General Counsel has excepted to the judge's finding, but seeks no remedy for the alleged violation beyond what we have already directed for the separate, uncontested violation concerning Gurrola. See fn. 2, supra. Accordingly, we find it unnecessary to pass on this allegation.

[5] In adopting the judge's dismissal of the allegation that Aim and Jacobson jointly refused to hire or consider for hire Aizu, we rely solely on the Acting General Counsel's failure to establish that, at the time Aizu applied, Jacobson was aware of his union affiliation. Aizu applied using an alias, and Jacobson wrote "not with Union" on his application. As described below, Jacobson had written "Union" on the applications of the other union-affiliated applicants.

We reverse the judge's finding that Aim did not violate Sec. 8(a)(1) by telling Gurrola that he no longer worked for Aim when he unconditionally offered to return. The judge found, without exception, that Aim terminated Gurrola in July 2008 for engaging in a protected economic strike. Aim's statement to Gurrola that he was not entitled to reinstatement because he no longer worked for Aim clearly referred to Gurrola's earlier discharge. It would have reasonably tended to convey the message that additional protected activity would negatively affect his employment prospects. See *TPA, Inc.*, 337 NLRB 282, 283–284 (2001). Accordingly, we find that Aim's statement was coercive and violated Sec. 8(a)(1).

## III. THE REFUSAL TO HIRE 10 UNION-AFFILIATED APPLICANTS

As stated above, we find that Aim violated Section 8(a)(3) and (1) by refusing to hire or consider for hire applicants Aizu, Bolaños, Macias, Flores, Anaya, Collison, Speakman, McClure, Equizabal, and Rohrback. Contrary to the judge, we find that Aim's asserted nondiscriminatory hiring policy, which it raises as a defense to this allegation, was in fact a pretext to mask its discrimination against union applicants.

### *A. Aim's Hiring Practices*

Throughout the hearing, Aim emphasized that it does not accept walk-in applications for employment. Instead, Aim asserted that its practice is to rely exclusively on (1) rehiring former employees; and (2) hiring individuals who have been referred by current employees. The judge did not make a finding as to when Aim assertedly began this practice. Aim Owner Michael Gibbs testified that, from about 2000 through 2006, Aim sought new hires by placing ads in local newspapers and accepting cold-call applications, some of which were kept on file for 4–6 weeks. Gibbs could not identify the start date of Aim's current practice, but testified that starting in 2006 or early 2007 Aim began shredding all hand-delivered and faxed-in applications. Gibbs testified that beginning around that time Aim could find an abundance of good workers by rehiring former employees and from referrals. Gibbs further testified that these practices were more efficient and cost effective than its prior practices.

The judge found that Aim has two signs posted at its office stating that it is not accepting applications; Gibbs testified that they have been displayed since about early 2008. When asked whether Aim's reliance on rehires and referrals is the Company's official policy, Gibbs stated that "it's not a policy, period." Instead, he asserted that it is merely the way that Aim meets its hiring needs. Gibbs added that, "[i]t's not a written policy because we've not had to go there."

Reliable evidence undermines Gibbs' testimony. Aim hired four walk-in applicants during the first half of 2007. In May 2008, it hired walk-in applicant Jose Gurrola. Shortly thereafter, Gurrola began wearing union paraphernalia and soliciting Aim employees to sign union authorization cards. The record evidence indicates that, thereafter, Aim hired no additional walk-in applicants. However, applicant Equizabal testified, without contradiction, that he hand delivered an application for employment to Aim in June 2009. Equizabal stated that Aim's secretary accepted the application and said that she would call him if work became available.

From May 27 through August 10, 2009, Aim hired nine full-time employees, five of whom were former employees and four of whom were referrals. The judge found that, during this period, Aim's workload had increased substantially and its employees were working a considerable amount of overtime. All five of the rehired employees Aim had previously fired for cause, for reasons including failure to timely appear for work, deficient work performance, and excessive customer complaints.

During the same period, Aim unlawfully refused to hire or consider for hire former employees Gurrola and McMillan, both of whom were union supporters. As stated above, Aim does not contest the judge's finding that it unlawfully refused to hire or consider for hire Gurrola because he engaged in protected strike activity during his earlier tenure with Aim. With respect to McMillan, a former employee who had been laid off several years earlier, we agree with the judge that Aim violated the Act by refusing to hire or consider him for hire, as well.[6]

Also during the same period, on June 30, Aim began to request temporary employees from Jacobson, an employment agency. Gibbs testified that Aim would go to Jacobson when it could not meet its staffing needs through hiring former employees and referrals. Lazaro Campos, Aim's superintendent, testified that Aim requested employees from Jacobson when it was coming to the end of a job and it was preferable to use a temporary employee rather than hiring a new employee. Gibbs acknowledged, however, that some Jacobson employees worked at Aim for significant periods of time, sometimes even working at Aim sites longer than Aim employees. Campos described one situation where he suggested to a friend that he apply with Jacobson if he wanted to work at Aim.

### *B. Aim does not Respond to Aizu's Application*

Union organizer Angel Aizu testified that in April he went to Aim's office seeking employment. Although Aim's secretary indicated that it was not hiring, she gave Aizu an application for employment and a business card for Lazaro Campos. On May 27, Aizu, this time accompanied by known union activist Gurrola, returned to Aim's office. The secretary told them that things were slow and that no work was available. Nonetheless, she

[6] Aim contended that it declined to hire or consider for hire McMillan because he had previously engaged in rude and belligerent conduct. Specifically, Aim alleged that when it laid off McMillan, he announced, in a very dramatic tone, "Do me a favor, lose my number." The judge found, and we agree, that Aim's account of this incident was greatly exaggerated and that Aim presented it as a pretext for its unlawfully motivated hiring decision.

accepted Aizu's application and told him that she would pass it to Campos. On June 1 and 9, Aizu called the Aim office, indicated that he had submitted an application, and asked if Aim was hiring. In both instances, he was told that things were slow. Aim never contacted Aizu regarding employment.

### *C. Aim does not Consider the Applications of Nine Other Union Members*

On June 23, the Union faxed job applications to Aim for union members Bolaños, Macias, Flores, Anaya, Collison, Speakman, McClure, Equizabal, and Rohrback. The Union wrote the word "organizer" on all nine applications before faxing them. The judge found that each of the applicants testified credibly that he filled out the application himself and would have accepted employment with Aim had it been offered. Aim owner Gibbs testified that he knew that the faxed applications came from the Union. He conceded that Aim never considered any of those applicants. Gibbs did not shred the applications, but only because he was instructed by legal counsel to save them for possible litigation.

### *D. The Judge's Findings*

The judge found, without exception, that the Acting General Counsel met his initial burdens under *FES* for all 10 applicants.[7] Specifically, the judge found that the Acting General Counsel established that: (1) Aim was hiring and had specific plans to hire during the period covered by the allegations in the complaint; (2) all of the applicants had the necessary experience to work at Aim; and (3) antiunion animus contributed to Aim's decision not to hire the applicants, as evidenced by its other unfair labor practices. Nonetheless, the judge concluded that, because Aim rejected the applicants pursuant to a nondiscriminatory preference policy, it successfully rebutted the Acting General Counsel's showing. On this basis, he dismissed the allegations. The Acting General Counsel excepts, contending that Aim's purported policy was pretextual or, in the alternative, that it discriminated against union applicants. We agree that Aim's stated policy was pretextual.[8]

## Discussion

The Board has held that "an employer legitimately may implement a hiring policy based on a hiring system that gives preference to former employees and employees referred by current employees." *CBI Na-Con, Inc.*, 343 NLRB 792, 792 (2004). "Where an employer departs from such a policy in a sufficient number of instances, however, it cannot carry its [*FES*] rebuttal burden by relying on the policy." *Jesco, Inc.*, 347 NLRB 903, 906–907 (2006). Of course, an employer cannot rebut the General Counsel's initial showing of discriminatory motivation with a pretextual explanation, such as an asserted hiring policy that was not actually relied on. Id. at 907. Finally, in determining whether an employer has unlawfully excluded applicants from the hiring process, the Board considers all of the surrounding circumstances. *C&K Insulation, Inc.*, 347 NLRB 773 (2006). Here, we find that the judge erred by accepting Aim's purported nondiscriminatory hiring policy at face value, without analyzing the totality of Aim's hiring practices. We have carefully examined the record and, for the reasons set forth below, we find that Aim's asserted hiring policy was a pretext for discrimination against union applicants.

First, we find that Aim failed to establish that its asserted hiring policy predated the Union's organizing drive, or that it was ever an official policy at all. Aim's testimony in this regard was inconsistent and vague. Aim's owner, Gibbs, imprecisely characterized the implementation of the policy as an "evolving process" that developed over the period from 2005 to 2008. At another point, Gibbs testified that the policy was already in place when Aim promoted Campos to superintendent in February 2007. But the record evidence shows that Aim hired three walk-in applicants after that date.

[7] 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). Under *FES*, in order to meet his initial burden for establishing a refusal to hire violation, the General Counsel must show:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

Id. at 12.

Regarding refusals to consider for hire, the Board stated:

> [T]he General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

Id. at 15.

[8] In its reply brief, Aim asserted for the first time in this litigation that Aim was neither hiring nor had concrete plans to hire during the relevant period. Because Aim did not except to the judge's finding that Aim was hiring during that period, Aim has not properly raised this argument before the Board. *Teddi of California*, 338 NLRB 1032 (2003). In any event, the record clearly establishes that Aim was in fact hiring.

Aim failed to introduce any documentary evidence to substantiate the existence of a formal policy, and even at the hearing, Gibbs refused to categorize it as a policy at all. See *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112, 1115 (1999) (finding that employer's defense failed where it did not characterize hiring preferences as a policy and it failed to present documentary or corroborating evidence). Cf. *Ken Maddox Heating & Air Conditioning*, 340 NLRB 43, 44–45 (2003) (finding employer's defense to be valid where employer established that hiring policy was in existence 4 years before alleged unfair labor practices). Indeed, Aim's reliance on rehires and referrals became consistent only after Gurrola, the union organizer, was hired as a walk-in applicant. Aim's refusal to hire any more walk-in applicants after Gurrola supports an inference that its conduct was motivated by an unlawful desire to avoid hiring other union members who might apply through the same channel. See *Richard Mellow*, supra at 1114–1115.

Second, Aim never disclosed its purported hiring policy to union applicants, nor did it actually rely on the policy in rejecting them. See *Beacon Electric Co.*, 350 NLRB 238, 242 (2007). For example, in the spring of 2009, Aim accepted walk-in applications from both Equizabal and Aizu. Aim's secretary told Equizabal that he would be contacted if work became available. More tellingly, Aim lied to Aizu on three occasions by telling him that work was slow, when, in fact, its business was booming and it was hiring regularly. Id. (employer's defense failed where it "deceived the union applicants by denying that it was hiring . . . and deliberately sought to divert them from discovering its referral policy"). Although the judge acknowledged Aim's dishonesty, he failed to account for this evidence in evaluating the legitimacy of Aim's defense.[9]

Third, in pursuing its alleged preference for former employees, Aim departed from its asserted business rationale and manipulated its practices to exclude union applicants. Gibbs testified that rehiring former employees was a cost-effective way to ensure a high quality work force. Counsel for Aim echoed this sentiment in his opening statement, stating that Aim was looking for "capable, honest, and hardworking employees." All five of the former employees that Aim rehired, however, had been terminated for cause and, in several instances, had caused significant economic losses for Aim. See *Nelcorp*, 332 NLRB 179 (2000), enfd. 51 Fed. Appx. 33 (2d Cir. 2002). Given these circumstances, it is difficult to comprehend how Aim's hiring choices would have furthered its stated interests in quality work and cost efficiency.

Aim's purportedly neutral policy of rehiring former employees was also administered in an overtly discriminatory manner. Although Aim was willing to overlook the transgressions of former employees with poor work records, it refused to rehire former employees Gurrola and McMillan because they supported the Union. Aim argues that, unlike the other former employees it rehired, Gurrola and McMillan were unwilling to express remorse for their prior actions and take steps to reestablish Aim's trust. As the judge found, however, Aim's stated rationale is obviously pretextual. In Gurrola's case, Aim essentially demanded that he express remorse for engaging in a protected strike. Aim never even told McMillan the purported basis for its refusal to rehire him; he had no reason to know that an apology was necessary or expected. Moreover, McMillan was a stronger candidate for rehire than the five individuals who were reemployed, as he had been laid off for lack of work rather than discharged for cause. If Aim had any real preference, it was for former employees, whatever their ability, who did not support the Union.[10]

Fourth, although Aim asserted that it was able to meet all of its hiring needs by relying on rehires and referrals, it began requesting employees from Jacobson only 1 week after the Union faxed the packet of applications. Although the judge characterized the Jacobson employees as a wholly separate group of temporary hires, the record indicates that the distinction between hiring channels was more amorphous, with some Jacobson employees staying with Aim for significant periods. Aim's oft-

[9] Aim relies heavily on the fact that it displayed signs in its office stating that it was not accepting applications. However, according to Aim's representatives and hiring records, the statement was not true. Aim's purported policy of considering only rehires and referrals was not stated in the signs. Moreover, as shown above, Aim did accept applications from union supporters on several occasions, and in those instances, lied rather than tell them that they would not be considered pursuant to its purported policy.

[10] Aim also contends that its hiring policy could not have been discriminatory because it resulted in the employment of union-affiliated employees Mario Chavez, Saul Granados, Luis Jaime, Manual Murrieta, and Jose Villa. We reject this argument. As an initial matter, the judge found that both Chavez and Murietta explicitly denounced the Union before rejoining Aim. The record is clear that when they were rehired by Aim the Company knew that they were not union supporters. In addition, Villa, Granados, and Jaime were all initially hired long before the Union initiated its organizing campaign, and there is no evidence that any of them were still involved with the Union when they were hired. See *Fluor Daniel, Inc.*, 304 NLRB 970, 970–971, enfd. 976 F.2d 744 (11th Cir. 1992) (employer's hiring of applicants with "weak or nonexistent union ties" not a defense to discrimination). Although Aim relies on its hiring of Granados to argue that its policy to rely exclusively on rehires and referrals was nondiscriminatory, the facts do not support its argument: Granados was a walk-in applicant, not a rehire or referral.

repeated claim that it could fulfill its hiring requirements exclusively through the two preference categories was simply not true. See *Lin R. Rogers Electrical Contractors*, 328 NLRB 1165, 1166 (1999). In addition, although Campos apprised at least one prospective Aim applicant that work was available through Jacobson, Aim did not recommend this alternative to Aizu, nor did it forward the faxed union applications to Jacobson. See *Beacon Electric*, supra at 249. Finally, as discussed in the next section, we find that Aim unlawfully directed Jacobson to turn away three applicants once it became aware of their union affiliation. See *Jesco*, supra at 910 fn. 8. In all aspects of its hiring program, then, Aim worked aggressively to ensure that union applicants would not be hired.

For all of these reasons, we agree with the Acting General Counsel that Aim had "an overall scheme of refusing to hire or consider union applicants." *Beacon Electric*, supra at 242. In so doing, we reject Aim's asserted hiring practice as pretextual and find that Aim has failed to rebut the Acting General Counsel's *FES* case as to all 10 applicants. We therefore reverse the judge and find that Aim violated Section 8(a)(3) and (1) by refusing to hire them or consider them for hire.

## IV. THE JOINT EMPLOYER ALLEGATIONS

We also disagree with the judge's finding that Aim and Jacobson did not violate Section 8(a)(3) and (1) by refusing to hire or consider for hire union members McMillan, Bolaños, and Gonzalez.

### *A. Aim's Relationship with Jacobson*

Since 2008, Aim and Jacobson have been parties to a contract under which Jacobson provides temporary and temporary-to-permanent employees to Aim. Aim pays Jacobson an hourly rate for each employee that it uses. Jacobson, in turn, pays and provides benefits to the employees. When Aim seeks additional temporary workers, Aim Superintendant Lazaro Campos notifies Sandy Chavez, Jacobson's account manager. Chavez then recruits and interviews applicants to determine whether they would satisfy Aim's needs. She sends suitable applicants to Campos, who then interviews them himself and tells Chavez whether Jacobson should hire them. Jacobson does not hire an individual until Aim has expressly approved him.

During the hearing, Campos and Chavez provided extensive, undisputed testimony regarding the work duties of Jacobson employees while assigned to Aim. Although the workers that Jacobson sends to Aim are Jacobson employees, their day-to-day duties are dictated solely by Aim. They are supervised by Aim's foremen and leadmen. Aim tells them when to report to work and decides, without Jacobson's input, when they are to work overtime. Aim also provides Jacobson employees with tools, safety equipment, and all other needed materials and supplies. In addition, Aim has discretion to mete out low-level discipline, including verbal warnings. For more severe or repeated infractions, Aim contacts Jacobson to request an employee's removal, and Jacobson complies with Aim's request.[11]

### *B. Jacobson's Interview with McMillan*

On June 30, Aim Superintendant Campos contacted Jacobson Account Manager Chavez and requested insulators. Pursuant to the request, Chavez contacted McMillan, a former Aim employee who had been recommended by another insulator. During their initial phone conversation, McMillan told Chavez that he was not sure whether he was able to work for Jacobson because of his union status. After several additional conversations, however, Chavez invited McMillan to interview with Jacobson on July 14.

When McMillan arrived at Jacobson's office, Chavez gave him paperwork to complete. After McMillan completed it, Chavez asked him how his application with Jacobson would affect his union status. McMillan asked Chavez what she meant, and Chavez abruptly changed the subject. Chavez then told McMillan to go home and get his social security card; she warned that if he did not return promptly, she would give the job to someone else. McMillan returned with the card and completed the application process. At some point during their conversation, Chavez told McMillan that he was a good candidate for Aim. Chavez told McMillan to go home, and that Aim would call him to schedule an interview for 1 p.m. When McMillan returned home, however, Chavez called and told him that Aim had backed out and that there was no work for him.

The judge discredited Chavez' testimony about her pivotal conversations with Campos. Chavez testified that she contacted Campos after her meeting with McMillan and told him that she had a good candidate, whom, she further testified, she did not name. In Chavez' account, Campos replied that he was no longer looking for additional workers that day. The judge reasonably found that Chavez' testimony was "exaggerated" and "conveniently contrived to suit a litigation strategy."

[11] In 2008, for example, Campos called Chavez and directed her to replace a group of Jacobson employees working at Aim because Aim was not satisfied with their work performance. Chavez complied with that instruction.

*C. Jacobson's Interview with Applicants Bolaños and Gonzalez*

Later the same day that Chavez interviewed McMillan, Bolaños and Gonzalez arrived at Jacobson's office, coincidentally at the same time. Both had been told by Angel Aizu, the union organizer, that Aim was hiring workers through Jacobson. Upon their arrival, Chavez told Bolaños and Gonzalez that Aim had already hired two Jacobson employees that day and was going to hire two more. After completing their applications, Bolaños and Gonzalez went into Chavez' office where she examined the paperwork and asked them questions. Bolaños' application indicated that he had worked for Argus, a union employer. Chavez told both men that they would be sent to interview with Aim.

The record indicates that over the next 15 minutes Chavez engaged in a series of phone conversations with Campos. During Chavez' first call to Campos, she told him that she had two applicants with insulation experience. She arranged for Gonzalez to interview with Aim at 1:30 p.m. and wrote that time on his application. After further discussion with Campos, she told Bolaños that Aim was not interested in him and his interview was canceled. Shortly thereafter, Chavez received a call from Campos. After that conversation, Chavez asked Gonzalez who sent him for the job. Gonzalez replied that it was "Angel," and he produced a business card with Aizu's full name and his title as a union organizer. Chavez wrote the word "Union" on both applications and reported Gonzalez' union affiliation to Campos. Following further discussion with Campos, she told Gonzalez that Aim was no longer interested in interviewing him and that his interview was also canceled. Bolaños remarked that perhaps Aim did not want them because of their union affiliation. Chavez did not respond to that comment, but said that she was upset because she had to look for additional applicants.

The judge found that both Bolaños and Gonzalez were not working at the time and would have accepted employment with Jacobson had it been offered. He also wholly discredited testimony by Chavez and Campos regarding their discussions. Chavez testified that she called Campos and told him that she had two great candidates. In Chavez' account, Campos replied that he had already hired the first two referrals and that he did not need any additional workers. Campos also testified that when Chavez called him he did not need any more personnel. Chavez claimed that she never mentioned the Union in her conversations with Campos and that she wrote "Union" on the applications before she spoke with Campos because she considered that a positive attribute. The judge observed, however, that in Chavez' pretrial affidavit, she stated that she wrote "Union" on the applications after she spoke with Campos. The judge also observed that neither Chavez nor Campos could explain why Campos required multiple phone calls to communicate that he did not need the workers.

*D. The Judge's Findings*

The judge found that Jacobson violated Section 8(a)(1) by interrogating McMillan and by threatening Bolaños and Gonzalez with a loss of job opportunities because of their support for the Union. The judge relied on the fact that Jacobson canceled their interviews immediately after they disclosed their union affiliation. No party excepts to those findings.

Nonetheless, the judge dismissed the Acting General Counsel's allegation that Aim and Jacobson, acting as joint employers, violated Section 8(a)(3) and (1) by refusing to hire or consider for hire McMillan, Bolaños, and Gonzalez. Relying on the following stipulation of the parties: "Respondent Jacobson is a joint employer with Respondent Aim Royal with respect to those individuals that were Jacobson employees assigned to the Aim Royal workplace," the judge rejected the Acting General Counsel's contention that Aim and Jacobson acted as joint employers with regard to McMillan, Bolaños, and Gonzalez. He reasoned that none of these applicants had ever been assigned to Aim's workplace. He also found that Jacobson could not have refused to hire McMillan, Bolaños, and Gonzalez, because it did not have authority to hire employees without Aim's approval. The judge also found that Jacobson had fully considered the applicants and was ready to refer them to Aim. Finally, the judge found that the Acting General Counsel did not "allege that Aim independently violated the Act by rejecting these applicants."

The Acting General Counsel excepts, arguing that under the Board's analysis for joint employer liability in *Capitol EMI Music*, 311 NLRB 997 (1993), enfd. 23 F.3d 399 (4th Cir. 1994), Aim and Jacobson, acting as joint employers, violated the Act as alleged. For the reasons set forth below, we find merit in those exceptions.

Discussion

As an initial matter, we agree that *Capitol EMI* provides the appropriate framework for our analysis. In that case, Capitol operated a distribution facility using its own employees, as well as temporary employees provided by Graham, an employment agency. Id. Employee Harris worked for Graham and was assigned to work as a temporary employee at Capitol. Harris' supervisor at Capitol informed him that the company had to let him go because he supported the union. Capitol then contacted Graham and asked that Graham end Harris' assignment

at Capitol because he was not being cooperative with his supervisors. Graham complied and removed Harris from the assignment. Id. at 1013–1015.

The General Counsel's complaint alleged that Capitol and Graham discharged Harris because he supported the union. Id. at 1013. In evaluating the merits of the complaint, the Board adopted a three-step approach. First, it found that Capitol acted unlawfully in requesting that Graham terminate Harris' assignment. Second, it found that Capitol and Graham were acting as joint employers. Id. at 998 and fn. 7. Third, it found that in spite of the parties' joint employer relationship Graham was not liable for Capitol's unlawful activity. Id. at 1001.

In assessing whether Graham was liable for Capitol's unlawful conduct, the Board articulated the appropriate standard for finding that an employment agency is liable under Section 8(a)(3) and (1) for an unlawful action taken by the other employer. It held as follows.

> [I]n joint employer relationships in which one employer supplies employees to the other, we will find both joint employers liable for an unlawful employee termination (or other discriminatory discipline short of termination) only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it.

Id. at 1000. Applying this standard, the Board found that Graham was not liable for Capitol's unlawful conduct because it had no knowledge of Capitol's motive for seeking Harris' removal. In the present case, because the judge failed to meaningfully analyze any of the major issues under *Capitol EMI*, we discuss them below.

*A. Aim Royal's Liability*

First, we find that the judge erred by failing to find that Aim violated the Act by directing Jacobson not to hire McMillan, Bolaños, and Gonzalez. An employer may not lawfully direct an employment agency to affect an individual's employment status for discriminatory reasons. Id. at 1000 fn. 22. Here, the Acting General Counsel has adduced compelling evidence that Campos instructed Chavez, first, to find out whether the applicants were involved with the Union, and then, to reject them if they were. This process played out with unmistakable clarity during Chavez' interview with Bolaños and Gonzalez. Chavez had informed both that they were strong candidates for employment with Aim and that they would be sent for interviews. Nonetheless, they were quickly dismissed after Chavez disclosed their union affiliation to Campos. It is apparent that Campos, during his phone conversations with Chavez, instructed her not to send Bolaños and Gonzalez to Aim because they were with the Union. We can infer that Chavez abruptly canceled McMillan's scheduled interview with Aim for the same reason.

Aim's only defense is that it told Jacobson to turn away McMillan, Bolaños and Gonzalez because it no longer needed to hire additional workers that day. This contention is implausible given that Jacobson continued to search for applicants for Aim after all three applicants had been interviewed and rejected. And, as the judge observed, Campos could have communicated this message in a single phone conversation rather than a series of calls. The judge reasonably discredited the testimony underlying Aim's defense, and we find for the foregoing reasons that Aim violated Section 8(a)(3) and (1).

We reject the judge's suggestion that the Acting General Counsel did not properly allege that Aim violated the Act regarding these three applicants. At all times during litigation, the Acting General Counsel contended that both Aim and Jacobson acted unlawfully. In his complaint, the Acting General Counsel alleged that "the Respondents refused to consider for hire or hire McMillan, Bolaños, and Gustavo Gonzalez."[12] Consistent with this theory, the Acting General Counsel adduced evidence during the hearing regarding Aim's hand-in-glove relationship with Jacobson and its determining role in Jacobson's decision to dismiss these applicants. The Acting General Counsel asserts this argument yet again in his exceptions brief.[13] There was no reason for the judge to bypass the issue of Aim's liability.

*B. Joint-Employer Status of Aim and Jacobson*

Second, we find that Aim and Jacobson acted as joint employers with regard to McMillan, Bolaños, and Gonzalez. The test for joint-employer status is whether two entities "share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation*, 269 NLRB 324, 325 (1984). To establish a joint-employer relationship, there must be evidence that one employer "meaningfully affects mat-

[12] Even assuming that the judge correctly found that Aim and Jacobson did not act as joint employers, under *Capitol EMI*, he was still required to assess whether Aim was liable for its own actions. Id. at 1000 fn. 22. See also *Dews Construction Corp.*, 231 NLRB 182, 182 fn. 4 (1977), enfd. mem. 578 F.2d 1374 (3d Cir. 1978).

[13] Significantly, although Aim offers a defense to this theory of liability on the merits, it does not contend that the violation was not appropriately alleged in the complaint or litigated at the hearing, or that it lacked notice of its potential liability for its conduct in conjunction with Jacobson with respect to these three individuals.

ters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the other employer's employees." Id. The Board has found joint-employer relationships where an employer "participated meaningfully in the exercise of control over matters governing the terms and conditions of employment" of an employment agency's employees. *D&F Industries*, 339 NLRB 618, 640 (2003). See *Capitol EMI*, supra at 1017 (finding joint-employer relationship where employer assigned work to, directly supervised, and could effectively discipline employees of employment agency).

Here, Jacobson interviewed, hired, and paid wages and benefits to the employees it referred to Aim. Nonetheless, Aim exercised complete and exclusive control over those employees' day-to-day direction and supervision. Aim also maintained authority to discipline them and to order their removal from the worksite. In this regard, there is no record evidence that Jacobson was authorized to question or, in fact, ever questioned Aim as to its decision to terminate the services of Jacobson employees. *D&F Industries*, supra at 640. Aim "could effectively fire any or all of them by simply requesting that [Jacobson] remove any or all of them from its operations." *Capitol EMI*, supra at 1017. Significantly, as Jacobson concedes in its brief, Aim had the same unchallenged control over Jacobson's hiring decisions. Even after Jacobson interviewed applicants, it could not actually hire them until Aim conducted its own interviews of the applicants and expressed its approval. See *W. W. Grainger, Inc.*, 286 NLRB 94, 96 (1987), enf. denied on other grounds 860 F.2d 244 (1988). For these reasons, we find that the Acting General Counsel easily established that, at all material times, Aim and Jacobson were joint employers with regard to McMillan, Bolaños, and Gonzalez.

We disagree with the judge that finding a joint-employer relationship here is precluded by the parties' stipulation, above p. 6, which provided that the parties were joint employers with respect to individuals assigned to the Aim workplace, without any qualification or limitation. The language used does not bar a finding that Aim and Jacobson were also joint employers during the prehire stage, nor is there any indication in the record that the parties so intended.[14] And, as shown above, there is ample record evidence that Aim and Jacobson acted as joint employers with regard to these applicants.

### *C. Jacobson's Liability*

Finally, we find that Jacobson is jointly liable for Aim's unlawful conduct. Under *Capitol EMI*, supra, once the General Counsel has established that the two employers were joint employers and that one of them has taken an unlawful discriminatory action against an employee in the jointly managed work force, the burden shifts to the employer seeking to escape liability to show that it neither knew nor should have known of the reason for the other employer's action. Id. at 1000. In the present case, because the Acting General Counsel has met his burden, the burden shifted to Jacobson. The record, however, makes clear that Jacobson Account Manager Chavez was fully aware that Aim Superintendant Campos' requests were motivated by union considerations: Chavez probed the applicants regarding their union status, passed this information to Campos, and then wrote "Union" on their applications. See *Skill Staff of Colorado*, 331 NLRB 815 (2000).

Contrary to the judge, Jacobson did not fully consider McMillan, Bolaños, and Gonzalez merely because it interviewed them and was ready to refer them to Aim. Jacobson considered the applicants only until Aim made clear that they were not acceptable because of their union affiliation. At that point, Jacobson swiftly rejected them pursuant to Aim's directive, without protest or even the slightest expression of disapproval. Id. Rather, Jacobson fully acquiesced in Aim's effort to exclude them from the hiring process.

For all of these reasons, we reverse the judge and find that Aim and Jacobson, acting as joint employers, violated Section 8(a)(3) and (1) by refusing to hire or consider for hire McMillan, Bolaños, and Gonzalez.

### AMENDED REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Aim Royal violated Section 8(a)(1) by maintaining overly broad work rules, we shall order it to cease and desist, to rescind its unlawful rules and remove them from its employee handbook, and to advise employees in writing that its unlawful rules are no longer being maintained. See *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

Having found that Respondent Aim Royal alone violated Section 8(a)(3) and (1) by refusing to hire or consider for hire Jose Gurrola, Shawn McMillan, Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback, we shall order Respondent Aim Royal to offer them instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent posi-

[14] Contrary to Jacobson's contention, the fact that the parties enumerated the names of the Jacobson employees who were assigned to the Aim workplace does not alter the meaning of the stipulation.

tions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them. Further, we shall order Respondent Aim Royal to make them whole for any loss of earnings and other benefits suffered as a result of discrimination against them by Aim Royal alone.

Having found that Respondents Aim Royal and Jacobson Staffing, acting as joint employers, violated Section 8(a)(3) and (1) by refusing to hire or consider for hire Shawn McMillan, Luis Bolaños, and Gustavo Gonzalez, we shall order the Respondents to offer them instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them. Further, we shall order Respondents Aim Royal and Jacobson Staffing to jointly and severally make them whole for any loss of earnings and other benefits suffered as a result of both Respondents' discrimination against them.

The duration of the backpay period shall be determined in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007), pet. for review dismissed 561 F.3d 497 (D.C. Cir. 2009). Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, supra. Although our Order herein provides for instatement, the instatement award is subject to defeasance if, at the compliance stage, the Acting General Counsel fails to carry his burden of going forward with evidence that the discriminatees would still be employed if they had not been victims of discrimination. *Oil Capitol Sheet Metal*, 349 NLRB at 1354.

Finally, we agree with the judge that the notices shall be posted in both English and Spanish.

## ORDER[15]

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. The Respondent, Aim Royal Insulation, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining overly broad work rules that prohibit employees from leaving the work area or jobsite without permission.

(b) Coercively interrogating applicants concerning their support for the Union.

(c) Threatening applicants with loss of employment opportunities because of their union or other protected concerted activities.

(d) Refusing to hire, or to consider for hire, applicants because of their union or other protected concerted activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the employee handbook's rules that prohibit employees from leaving the work area or jobsite without permission.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise employees that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

(c) Within 14 days from the date of this Order, offer Jose Gurrola, Shawn McMillan, Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, John Rohrback, and Gustavo Gonzalez employment in the position in which they would have been hired in the absence of discrimination against them or, if that job no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Jose Gurrola, Shawn McMillan, Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback whole for any loss of earnings and other benefits suffered as a result of discrimination against them by Aim Royal alone, in the manner set forth in the amended remedy section of the decision.

(e) Jointly and severally with Respondent Jacobson, make Shawn McMillan, Luis Bolaños, and Gustavo Gonzalez whole for any loss of earnings and other benefits suffered as a result of both Respondents' discrimination against them, in the manner set forth in the amended remedy section of the decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to

[15] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), we modify the judge's remedy by requiring that backpay shall be paid with interest compounded on a daily basis. We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

hire or consider for hire and, within 3 days thereafter, notify the employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix A."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 20, 2009.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, Jacobson Staffing, L.C., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling applicants that they will not be hired because of their union status.

(b) Coercively interrogating applicants concerning their union status.

(c) Telling applicants that they lost employment opportunities because of their support for the Union.

(d) Refusing to hire, or to consider for hire, applicants because of their union or other protected concerted activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Shawn McMillan, Luis Bolaños, and Gustavo Gonzalez employment in the position in which they would have been hired in the absence of discrimination against them or, if that job no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Jointly and severally with Respondent Aim Royal, make Shawn McMillan, Luis Bolaños, and Gustavo Gonzalez whole for any loss of earnings and other benefits suffered as a result of both Respondents' discrimination against them, in the manner set forth in the amended remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire or consider for hire and, within 3 days thereafter, notify the employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix B."[17] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[17] See fn. 16, supra.

as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX A

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain overly broad work rules that prohibit you from leaving the work area or jobsite without permission.

WE WILL NOT coercively interrogate applicants concerning their support for the Union.

WE WILL NOT threaten applicants with loss of employment opportunities because of their union or other protected concerted activities.

WE WILL NOT refuse to hire, or consider for hire, applicants because of their union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights listed above.

WE WILL rescind the employee handbook's rules that prohibit employees from leaving the work area or jobsite without permission, and WE WILL furnish all current employees with inserts for the current employee handbook that (1) advise employees that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

WE WILL, within 14 days from the date of the Board's Order, offer Jose Gurrola, Shawn McMillan, Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, John Rohrback, and Gustavo Gonzalez employment in the position in which they would have been hired in the absence of discrimination against them or, if that job no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Gurrola, Shawn McMillan, Angel Aizu, Luis Bolaños, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback whole for any loss of earnings and other benefits suffered as a result of discrimination against them by Aim Royal alone, less any net interim earnings, plus interest.

WE WILL, jointly and severally with Respondent Jacobson, make Shawn McMillan, Luis Bolaños, and Gustavo Gonzalez whole for any loss of earnings and other benefits suffered as a result of the both Respondents' discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire or consider for hire and, within 3 days thereafter, notify the employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

AIM ROYAL INSULATION, INC.

## APPENDIX B

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell applicants that they will not be hired because of their union status.

WE WILL NOT coercively interrogate applicants concerning their union status.

WE WILL NOT tell applicants that they lost employment opportunities because of their support for the Union.

WE WILL NOT refuse to hire, or consider for hire, applicants because of their union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Shawn McMillan, Luis Bolaños, and Gustavo Gonzalez employment in the position in which they would have been hired in the absence of discrimination against them or, if that job no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, jointly and severally with Respondent Aim Royal, make Shawn McMillan, Luis Bolaños, and Gustavo Gonzalez whole for any loss of earnings and other benefits suffered as a result of both Respondents' discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire or consider for hire and within 3 days thereafter notify the employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

JACOBSON STAFFING, L.C.

*John Giannopolis, Esq.*, for the General Counsel.
*Thomas M. Rogers* and *Kristin M. Mackin, Esqs. (LaSota & Peters PLC)*, of Phoenix, Arizona, for Respondent AIM.
*Kevin J. Kinney, Esq. (Krukowski & Costello, S.C.*), of Milwaukee, Wisconsin, for Respondent Jacobson.
*Gerald Barrett, Esq. (Ward, Keenan, & Barrett, P.C.)*, of Phoenix, Arizona, for the Union.

## DECISION

### STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Phoenix, Arizona, on February 8–12, and 17, 2010. The charges and amended charge were filed by the International Association of Heat & Frost Insulators & Allied Workers, AFL–CIO, Local No. 73 (the Union) on July 17, September 28, and October 30, 2009,[1] and the order consolidating cases, consolidated complaint, and notice of hearing (the complaint) was issued October 30. The complaint alleges that Aim Royal Insulation, Inc. (Aim) and Jacobson Staffing, L.C. (Jacobson) are joint employers and, as clarified by the General Counsel, alleges that Aim violated Section 8(a)(1) by interrogating employees concerning their union activities and creating the impression that those activities were under surveillance and violated Section 8(a)(3) and (1) by failing to reinstate striking employee Jose Gurrola to his former position or to a substantially equivalent position and failing to consider for hire or hiring Gurrola, Angel Aizu, Shawn McMillan, and nine other named employee-applicants. The complaint also alleges that Aim maintained several provisions in its employee handbook that required employees to obtain permission before leaving a jobsite before the designated quitting time and indicated that leaving the jobsite without the requisite permission may be lead to automatic termination. The complaint alleges that Jacobson violated Section 8(a)(1) by threatening employee-applicants with loss of employment opportunities because of their union activities and interrogating employee-applicants concerning those activities, and violated Section 8(a)(3) and (1) by failing to consider for hire or hiring Shawn McMillan, Luis Bolaños, Gustavo Gonzalez, and Aizu. Aim and Jacobson filed timely answers that, as clarified at hearing, admitted the allegations in the complaint concerning filing and service of the charges, jurisdiction, labor organization status, joint employer status as it pertains to employees referred by Jacobson to Aim, and relevant agency status; both denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel[2] Aim and Jacobson, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Aim, a corporation, is engaged in the business of construction and repair of commercial insulation systems out of its facility in Phoenix, Arizona, where it annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Arizona. Aim admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Jacobson, a corporation, is engaged in the operation of an employment agency, including providing "temporary to permanent" labor, with facilities in several States including an office located in Phoenix, Arizona, where it annually provides services to enterprises located within the State of Arizona, including Aim, which in turn are engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. Jacobson admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Aim and Jacobson admit

[1] All dates are in 2009, unless otherwise indicated.

[2] I grant the General Counsel's unopposed motion to correct transcript that is attached to his brief.

and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. FACTS

### *A. Background*

Michael J. Gibbs is owner and president of Aim and Jeff Herron is vice president and part owner. Lazaro Campos is Aim's superintendent; he is in charge of the daily operations and made decisions concerning hiring of insulators subject to Gibbs' final approval. During the relevant time period Aim employed about 15–20 full-time insulators.

Sandy Chavez is Jacobson's account manager and its only employee at its Phoenix office. She is responsible for recruiting, interviewing, and hiring employees to satisfy the needs of its clients. Since 2008, Aim and Jacobson have been parties to a contract that provides that Aim will use the services of Jacobson for temporary and temporary to permanent employees at Aim's Phoenix location. Under this contract Aim pays Jacobson an hourly rate for each employee used by Aim. Jacobson, in turn, pays and provides benefits to the employees.

Lazaro Campos notifies Chavez when Aim is looking to employ additional temporary workers. Chavez then initially interviews applicants to determine whether they would satisfy Aim's needs and then sends them to Aim. Campos then also interviews the applicants and decides whether or not to hire them. Aim and Jacobson admit that they are joint employers of the employees referred by Jacobson and used by Aim.

### *B. Aim's Employee Handbook*

Aim's Employee Handbook contains the following provisions:

> Employees shall not leave the project other than at designated quitting times, unless authorization is obtained from the foreman or supervisor.
>
> . . . .
>
> Employees are required to be at their assigned work areas at the beginning of each work day and shall not [l]eave the designated area without obtaining authorization fro[m] their foreman or superintendent.
>
> . . . .
>
> Leaving Job Site. Any employee leaving the job site without the approval of the office or the supervisor may be automatically terminated.

Employees sign a form indicating that they have read and understood the employee handbook and that failure to abide by its rules could result in termination.

#### Analysis

Aim's employee handbook forbids employees from leaving the jobsite without permission and provides that employees who do so without permission may be automatically terminated. The General Counsel contends that these rules impinge upon the right of employee to strike, a right that does not require an employer's permission. In *Labor Ready, Inc.*, 331 NLRB 1656 fn. 2 (2000), the Board held that a rule that forbids employees from walking off a job under penalty of discharge violated Section 8(a)(1). More recently, in *Crowne Plaza Hotel*, 352 NLRB 382, 386–387 (2008), the Board held that work rules that forbid employees from leaving their work area without authorization before completion of their shift and from walking off the job violated Section 8(a)(1). The Board reasoned that:

> [T]hese rules unlawfully overbroad because an employee would reasonably read these rules as, respectively, requiring management's permission before engaging in such protected concerted activity, thereby allowing management to abrogate the Section 7 right to engage in such activity, or altogether prohibiting employees from exercising their Section 7 right to engage in such protected concerted activities.

Id. (footnotes omitted). Applying this case law, it follows that Aim's rules forbidding employees from leaving the jobsite without permission under penalty of termination likewise impinge upon employees' rights under Section 7 to concertedly engage in a work stoppage. In its brief Aim cites *Bechtel Power Corp.*, 239 NLRB 1139 (1979). That case is inapposite because it dealt with a situation involving raising complaints on company time. By maintaining work rules that prohibit employees from leaving the work area or jobsite without permission, Aim violated Section 8(a)(1).

### *C. Aim's Hiring Practices*

Regarding hiring of insulators, Aim's general practice is not to accept applications for employment from persons who walk in its office. To this end Aim has signs posted both on a window and on a door at its facility indicating that it is not accepting applications. Instead, Aim relies on rehiring former employees, including those fired for cause, and recommendations from current employees and supervisors to fill its hiring needs. Applications for these persons are then completed after the hiring process is started. In addition, Aim began using Jacobson's services to find insulators to work temporarily for Aim.

Aim hired the following insulators beginning May 27; this date is important because, as explained below, beginning on that date and continuing through July a number of union applicants sought employment with Aim:

Manuel Murrieta - July 17 (previously employed by AIM).
Mario Chavez – July 8 (previously employed by AIM).
Anthony Sandoval – June 10 (previously worked for AIM).
Luis Jaime – July 15
George Campos – June 16 (previously employed by AIM).
Sean Herron – May 27
Jacob Ollarsava – July 24
William Loy – June 26 (previously employed by AIM).
Victor Hernandez – August 10

Aim's workload was increasing substantially in July and employees were working a lot of overtime. Lazaro Campos found it necessary to perform insulation work himself; this was unusual.

Number 1 above, Murrietta, was rehired after he had been fired for cause when he did not appear for work; Murrieta otherwise was a good worker. Murrieta filed a claim for unem-

ployment insurance with the State of Arizona and Aim indicated that Murrieta had been fired on May 19, 2008, for:

> [C]onsistently being late to work, leaving work early and deficient work performance. He was warned in writing two times before he was fired. After we fired him he joined Asbestos Workers Union (Local 73) and has been employed with other insulation contractors since. For these reasons we protest this claim.

In fact, Aim lost the customer on which Murrieta had been working. Before Murietta was rehired he told Lazaro Campos "bad things" about the Union. Number 2 above, Chavez, was also rehired after having been fired for cause. Aim's records indicate the Chavez was fired on October 24, 2008, for:

> To[o] many customer complaints & employee complaints. Would not do as told, he would not order material accordingly was always running out of material & was not working when his title is workin[g] foreman.

Lazaro Campos also knew that Chavez had been in the Union before Aim rehired him, but he too complained to Campos about the Union before Aim agreed to rehire him. Number 3, Sandoval, has previously been fired by Aim because he was failing to show up for work. Number 4, Jaime, was recommended for employment by employee Murrietta. Number 5, George Campos, is the brother of Lazaro Campos, Aim's superintendent. George Campos had been fired earlier by Lazaro because George was not sufficiently productive. Number 6, Sean Herron, is Jeff Herron's son and Gibbs' grandson and works during the summer when he is not in school. He worked in the warehouse where, among other things, he helped with prefab work that is typically part of work performed by insulators. Employee Joseph Campos, recommended number 7, Ollarsava, for employment. Loy, number 8, had earlier been terminated by Aim after Lazaro Campos discovered that Loy did not appear at a jobsite as scheduled. Lazaro Campos recommended number 9, Hernandez, for employment.

Armando Torres was originally listed by Aim as a "walk-in" but Lazaro Campos credibly explained that this was an error and instead Torres was recommended for hire by employee Juan Torres.

### *D. Organizing Effort*

The Union had a detailed, written organizing plan for Aim. The goal, unsurprisingly, was to get Aim to sign a contract. The plan included the use of "salts" and "peppers" and described efforts to get the 30 percent of employees to sign authorization cards that are needed to trigger an NLRB election. The plan included the following:

> If we don't have enough support to win an election we should file Unfair Labor Practice's to buy time to gain support.

Dale Medley, a business agent for the Union, credibly testified that this meant the Union would file charges only when there was evidence to support them. In fact, apart from the charges involved in this proceeding, the Union filed one other charge. That charge was filed on June 27, 2008, and withdrawn on July 8, 2008. Aim contended at trial and argues in its brief that the Union's organizing plan served to remove the union organizing activity, in particular that of Jose Gurrola described below, from the protection of the Act. However, I have examined the plan and find nothing in it worthy of mention that supports such a conclusion. Also, I reject Aim's assertion that I should draw an adverse inference from the Union's alleged failure to produce certain minutes that Aim had subpoenaed. Although there was some initial lack of clarity in the Union's response, the matter was finally resolved to my satisfaction and I conclude that the Union has provided Aim with all the requested documents.

Jose Gurrola is an organizer for the International Association of Heat and Frost Insulators and Allied Workers Union; he has also worked as an insulator. He was assigned to seek work at Aim and then organize its employees. On May 16, 2008, Gurrola went to Aim's office and asked for, was given, and completed an application for employment. This is notwithstanding the sign posted by Aim indicating that it was not accepting employment applications. After speaking with Lazaro Campos by telephone Gurrola was hired. At that time he was neither a former employee nor was he referred for employment by any Aim employee thereby contradicting Aim's general hiring practice. Campos did not know that Gurrola was an organizer for the Union at the time he hired Gurrola. In mid June 2008 Gurrola began wearing union "paraphernalia" at work. On July 2, 2008, the Union notified Aim by letter that Gurrola had signed an authorization card and would be soliciting other employees to do so also. At times during 2008 the Union distributed handbills to employees criticizing Aim's employment policies and encouraging employees to join the Union.

Gurrola and the Union planned that Gurrola would go on strike at some point. Gurrola observed that at times Aim did not provide water for its employees at jobsites where they were working; he discussed this issue with other employees. Remember that these jobsites are in the Phoenix area and that this occurred during the summer. On July 17, 2008, the employees working for Aim at the Gila River Indian Project, including Gurrola, ran out of water. There were other contractors working on the site and these contractors provided water for their employees. These contractors would certainly allow a thirsty employee from another contractor to have some water if the employee's own employer had failed to provide water, but it was understood that each contractor should supply water for its own employees. On July 18 Gurrola met Joseph Campos, the lead person for Aim at the Gila River Indian Project, at Aim's office before starting work. Gurrola picked up some keys to the project because Campos was going to be late arriving at the project. Joseph Campos told Gurrola that he would fill the jug with water and bring it to the jobsite later. When Gurrola arrived at the project at around 6 a.m. it was hot outside and of course Aim had still not placed water on the jobsite for its employees; Gurrola was also unable to find any dust masks. He called Angel Aizu, organizer for the Union, reported these observations to him, and indicated that this would be the day he went on strike. They had previously planned that when Gurrola went on strike Aizu would come to assist Gurrola. Gurrola then also called Lazaro Campos at about 8:12 a.m. and told him he was on strike because there was no water and no dust masks at the site. Campos then called Gibbs and informed Gibbs of

the matter and indicated that Aim did not, in fact, have water at the site for its employees that morning. Gurrola stopped work and began his strike. He and Aizu picketed outside the jobsite with signs reading "Strike. AIM Royal Insulation."

On July 18, 2008, Gibbs sent Gurrola a letter regarding the work stoppage that read:

> It has come to my attention that you informed the labor superintendent that you were going on strike because of your allegation that Aim Royal Insulation would not provide you with drinking water at the jobsite. This is not a true statement. Drinking water has been provided on site for you. Had you asked the superintendent he would have advised you that the foreman that brings the water was going to be a half hour late today. This is your notice that you must contact the superintendent for assignment for Monday, July 23, 2008. If you do not it may be grounds for dismissal from Aim Royal Insulation.

Aim terminated Gurrola on July 24, 2008. That same day, July 24, Gurrola went to Aim's office with a handwritten note that read "Aim Royal Insulation will provide proper safety equipment and will also provide water to all their employees to all jobsites being performed." Gurrola announced that he would end his strike and return to work if Aim agreed to those demands. Aim refused to accept the handwritten note. Instead, Gurrola was told that he had been terminated. Gurrola made a recording of the conversations, and from the transcript of the recording it is clear that the reason Gurrola was fired was because he went and remained on strike. Indeed, according to notes made by Gibbs shortly after this event:

> [I] said that his actions on the job and the fact that he did not contact Lazaro [Campos] for placement for employment was (sic) considered abandonment of his position at this company. He said he didn't quit and that we were firing him for union activities. He was told that the union did not matter to us but that we cannot allow employee to arbitrarily walk of[f] jobs and jeopardize relationships with contractors or employees.

Gurrola then explained to Gibbs that he was on an economic strike for the benefit on Aim's employees over the issues of lack of water and masks at the jobsite.

As part of the organizing effort, in 2009 the Union sent letters to governmental agencies concerning Aim.

### *E. Complaint Allegations against Aim*

In April 2009 Gurrola called Aim and spoke with Lazaro Campos, Gurrola unconditionally offered to return to work, but Campos told Gurrola that he no longer worked for Aim. As noted above, Aim hired a number of insulators over the period of time beginning May 27 through August 10. On May 27, 2009, Gurrola and Aizu went to Aim's office; Gurrola made a tape recording of the conversation that occurred. Gurrola asked for work so he could end his strike and return to work unconditionally. Aizu also sought employment and left an employment application. They were told that things were slow and no work was available. Aizu credibly testified that he would have accepted employment if it were offered. That same day Gurrola contacted Lazaro Campos by telephone and made an unconditional offer to return to work. On June 1 and 9 Aizu called Aim's office and indicated that he had left an employment application and asked if Aim was hiring; in both instances he was told that things were slow.

On June 23 the Union faxed applications for employment for Luis Bolaňos, Ezequiel Macias, Jose Flores, Adrian Anaya, Nathan Collison, Darrel Speakman, Chester McClure, Pablo Equizabal, and John Rohrback to Aim. Earlier, on June 12 Speakman, a member of the Union, filled out an application for Aim after a layoff and being informed that he would be out of work for quite a while. He received the application from Aizu who informed him that he would send it to Aim upon completion. Aizu placed the word "organizer" on the top of the application as well as on the remaining eight applications. Bolaňos likewise filled out an application for Aim at Aizu's urging. Aizu told him that he would send the application to Aim. Bolaňos, who was unemployed at the time he filled out the application, credibly testified that he would accepted employment there if it had been offered. Jose Flores, Adrian Anaya, John Rohrback, Pablo Equizabal, Chester McClure, Nathan Cullison, Ezequiel Macias, all also completed applications, gave them to Aizu, and credibly testified that they would have accepted employment with Aim if they had been offered positions. It was apparent to Gibbs from the content of the applications that the Union had sent them. Gibbs admitted that Aim never considered hiring those applicants, explaining that Aim continued to be able to fulfill its needs under the process that excluded walk-in applicants. Gibbs retained those applications and kept them on his desk.

## Analysis

The complaint alleges that Aim refused to reinstate Gurrola to his former position or to a substantially equivalent position or to place him on a preferential hiring list after he terminated his strike and made an unconditional offer to return to work. However, I have concluded that Aim terminated Gurrola's employment on July 24, 2008. No charge was filed to challenge the legality of that termination and the 10(b) period has long expired. I may not make a finding concerning its legality. The rights under *Laidlaw Corp.*, 177 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), flow to former strikers who remain employees and not to former employees. The General Counsel cites *Lee A. Consaul Co.*, 192 NLRB 1130 (1979). In that case the Board adopted the judge's finding that strikers who were fired outside the 10(b) period but who later made unconditional offers to return to work were nonetheless entitled to the *Laidlaw* rights. But this finding is contrary to countless other Board cases that hold that *Laidlaw* rights end when a striker has been lawfully fired and here Section 10(b) precludes me from finding otherwise. It appears, however that the Board later found it significant that in *Lee Consaul* there was an "agreement acknowledging the possibility of reinstatement of discharged strikers constituted "changed circumstances," amounting, in effect, to rescission of the discharges and restoration of the status of striking employees. (footnote omitted)" *Woodlawn Hospital*, 233 NLRB 782, 790 (1977). There is no such agreement in this case. I agree with Aim's observation in its brief that:

> If an employee after an unchallenged . . . termination can receive the right to reinstatement . . . by simply walking in and offering unconditionally to return to work, Section 10(b) is nullified.

I dismiss this allegation.

The complaint alleges that Aim violated the Act when in about April after Gurrola made his unconditional offer to return to work Lazaro Campos told him that he no longer worked for Aim. The General Counsel cites *H.B. Zachary Co.*, 319 NLRB 967, 969, enforced in part sub nom. *International Brotherhood of Boilermakers v. NLRB*, 127 F. 3d 1300 (11th cir. 1997). But that case involved a typical 8(a)(1) threat that connected discharge with protected concerted activity. Here, Campos told Gurrola that Gurrola no longer worked for Aim, that statement was not connected to any activity protected by Section 7. Moreover, as more fully described above, Gurrola in fact had been terminated by Aim outside the 10(b) period that is applicable to this case and thus the legality of that discharge cannot be challenged in this proceeding. Under these circumstances I dismiss this allegation of the complaint.

The complaint next alleges a number of violations concerning employee-applicants. In *Toering Electric Co.*, 351 NLRB 225 (2007), the Board criticized the practice of labor organizations in some salting campaigns of submitting batched applications on behalf of workers who were neither aware of the applications nor interested in employment with the employer. The Board also criticized applicants for employment that engage in conduct clearly inconsistent with an intent to gain employment. The Board condemned employment application practices designed solely to create a basis for unfair labor practice charges and thereby inflict substantial litigation costs on employers. To remedy these described abuses, the Board placed an additional burden on the General Counsel to establish that applicants for employment have a "genuine interest in seeking employment." In this case I conclude that all the applicants for employment genuinely sought employment at Aim or, as described below, Jacobson. All credibly testified that they intended to accept employment from these employers; all were in personal circumstances where accepting employment seemed entirely reasonable, and none of the applicants engaged in any conduct that could be considered as inconsistent with accepting and remaining employees.

In addressing these allegations I next apply *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3rd Cir. 2002). Here, the General Counsel has established that all the applicants had the experience necessary to perform the work for Aim and Jacobson. The evidence also shows that Aim was hiring and had concrete plans to hire during the period May 27 through July 15, the time period specifically covered by the allegations in the complaint. I have described above how during the time period May 27 through August 10, a time period that I conclude may be appropriately considered by the complaint allegations, see *Zarcon, Inc.*, 340 NLRB 1222, 1228–1229 (2003), Aim hired about 8–9 insulators.

I now specifically address the allegations to determine whether antiunion animus played a role in Aim's failure to hire the applicants for employment. The first complaint allegations pertain to the May 27 and July 7, 2009, applications for employment to Aim made by Gurrola and Aizu. As to Gurrola, I again note that he had been employed by Aim previously and had been fired on July 24, 2008. Under most circumstances my analysis would quickly end because many employers do not rehire employees that they have fired. But Aim specifically relies on its practice of doing so as a means of supplying its hiring needs so as to avoid hiring unknown applicants, including those who might be supporting a union. I have described above the more specific circumstances of how Aim rehired workers it had earlier discharged for cause during the very time period it had refused to rehire Gurrola. Because Gurrola was a previous employee and because Aim hires workers that have worked for it in the past, even if fired for cause, the more precise question becomes why did Aim not rehire Gurrola. Gibbs admitted that he never considered rehiring Gurrola for any of the positions that were filled in the weeks following Gurrola's attempt to be rehired. Gibbs explained that "Gurrola has never expressed to this company a remorse for his actions when he was terminated." Gibbs later expanded that he did not consider rehiring Gurrola because:

> Attitude. When you have an organization you can't have people on their own being disruptive to this organization. With the fact of what was done, what transpired during that period of time, we determined that we did not want him to be an employee at AIM Royal.

In context I conclude that Gibbs was referring to the fact that Gurrola had engaged in a strike against Aim and that was the reason Aim failed to rehire him. I further conclude that the strike was part of Gurrola's union activity. See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 95–96 (1995) ("the employer has no legal right to require that, as part of his or her service to the company, a worker refrain from engaging in protected activity").

Aim argues that Gurrola's strike was unprotected for a number of reasons. First, Aim argues that Gurrola's activities were not concerted. But the strike and ensuing picketing were by their very nature designed to induce other workers to join in. This is especially so because the reasons for the strike quickly spread across the jobsite that day. This distinguishes the cases cited by Aim in its brief; they involved safety complaints and did not involve a strike and picketing. Next, Aim argues that Gurrola's strike was unprotected because he failed to first inform Aim of the reason behind the strike. But neither the facts nor the law support this argument. As a matter of fact I have described above how Gurrola called Lazaro Campos at 8:12 a.m. and informed him of the reason for the strike; this was before Aizu arrived and before they began picketing at the jobsite. As a matter of law, there is no requirement that employees first give notice to an employer before engaging in a strike. Aim cites *House of Raeford Farms, Inc.*, 325 NLRB 463, 467–468 (1998). But there the Board stated:

> [W]e do not agree with the judge's suggestion that an explicit demand made upon the employer is a necessary prerequisite to a finding of protected activity. See, e.g., *McEver Engineering, Inc.*, 275 NLRB 921, 925–926 (1985).

Id. at 463 fn. 2. Aim also implies that Gurrola's strike was unprotected because there was water on the jobsite, albeit not Aim's water, that was available to Gurrola and because Aim would have eventually supplied its own water at the site later that day. The fact remains, however, that the failure of Aim to provide water for its employees at the jobsite, especially in Phoenix during the summer, is a condition of employee over which employees are entitled to strike. The Board does not second guess employees to assess whether the matter at issue was really worthy of complaint. *Al Monzo Construction Co., Inc.*, 198 NLRB 1212, 1214 (1972), enfd. 485 F.2d 680 (3d. Cir. 1973). In summary, I conclude that Gurrola's strike was protected under the Act. By failing to hire and to consider hiring Gurrola because he engaged in union activity, Aim violated Section 8(a)(3) and (1).

I now address the complaint allegations concerning Aizu. In doing so I apply *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management*, 462 U.S. 393 (1983). The facts show that Aizu was a union organizer and Aim knew this. Aim's hostility towards the Union is shown by the unfair labor practices it committed as described above. I conclude the General Counsel has met his initial burden under *Wright Line*. I now assess whether Aim has shown that it would not have hired Aizu even if he had not been a union supporter. In support of this defense Aim points to its hiring practice. That practice, as described above, relies on rehiring former employees, including those fired for cause, and recommendations from current employees and supervisors to fill its hiring needs. The facial validity of this practice is not challenged by the General Counsel and appears to be consistent with similar policies that the Board has found to be lawful. See, e.g., *T.E. Briggs Construction Co.*, 349 NLRB 671 fn. 3 (2007). The General Counsel argues that Aim's support for this practice is based on Gibbs' testimony and that his testimony is not credible. While indeed I question Gibbs' testimony in other parts of this decision, I do credit Gibbs' testimony concerning Aim's hiring practice. This testimony is corroborated by Lazaro Campos and to some degree by business records. The General Counsel argues that Gurrola and one other employee were hired in contradiction of this practice in that they were hired as new employees "off the street." But these occasional and sporadic deviations are insufficient to undermine the existence of the general practice. Next, the General Counsel argues that the result of Aim's hiring practice is that Aim was able to reject competent union applicants by hiring back employees that it had fired for cause. But there is no contention that this policy is facially unlawful and there is no allegation in the complaint that this practice was adopted for an unlawful purpose. As I understand the law, it does not matter that the policy, as here, results in the exclusion of qualified union applicants from the hiring process.

Having resolved the issues concerning Aim's hiring practice, I now use that practice to determine whether Aim would have excluded Aizu from consideration for hire even if he were not a union supporter. Because Aizu was neither a former employee nor was he recommended by a current employee he did not qualify for consideration under Aim's practice. It follows that Aim has shown that it would not have hired Aizu or consider hiring him even if he were not a union supporter. I dismiss these allegations. Similarly, none of the nine employees whose applications were faxed to Aim by the Union on June 23 fit into Aim's hiring practice; I dismiss that allegation in the complaint. The same analysis dictates the dismissal of the complaint allegations that Aim refused to hire or consider Aizu for hire on about June 1 and June 10.

Returning to the facts of the case, on about July 15 Shawn McMillan called Aim and spoke with Campos. McMillan said that he wanted to come back to work for Aim. McMillan had worked for Aim 2 or 3 years earlier but had been laid off due to a reduction in force after a project was completed. Campos told McMillan that he had to talk to Gibbs who was not available at that time. On about July 16 Gibbs met with McMillan at Aim's office. McMillan asked Gibbs if there was any work. Gibbs answered there was none at that time, but he would talk to Campos and look into getting some work for McMillan. During the course of the conversation Gibbs said:

> I kind of heard that you were part of the union and how is that going for you, and I (McMillan) told him it's not really going for me at all because I didn't have no work at the time, and I was just trying to get some work any way I could honestly.

The facts in the preceding paragraph are based on McMillan's credible testimony. According to Gibbs, after McMillan indicated he wanted to work again for Aim, Gibbs explained that he did not know what his present labor needs would be, but that he had been told by Lazaro Campos that Aim needed additional workers. Gibbs said that he would check with Campos and see if they needed workers. According to Gibbs, during the course of the meeting McMillan indicated that the Union had approached him and offered him a third year apprenticeship if he would work for the Union. Gibbs denied there was any quizzing. Based on my observation of the relative demeanors of Gibbs and McMillan, I do not credit Gibbs' testimony that there was no quizzing. Gibbs testified that he consulted with Campos and decided not to respond to McMillan's request to return to work for Aim. According to Gibbs, this was because when McMillan came to the office to pick up his check after being laid off several years ago McMillan said in "a very dramatic tone" "Do me a favor, lose my phone number." Gibbs went on to describe how "[T]here's no reason for me to have to put up with belligerence. It was in the normal course of business and I was being subjected to his disdain for being discharged." This obvious exaggeration supports my conclusion to discredit Gibbs testimony. Lazaro Campos testified that McMillan stormed out of the office on that occasion and in a rude way as he said "lose my number." McMillan's version of this is that he was disappointed about having been laid off and simply stated to Gibbs to "lose his number" after Gibbs told him that Gibbs would call him if worked picked up. I conclude McMillan's testimony is again the most credible. As described above, Aim hired insulators on July 15, 17, and 24.

Analysis

The complaint contends that in about mid July Gibbs interrogated employees concerning their union activities and created

an impression among employees-applicants that their union activities were under surveillance. I have concluded above that Gibbs stated to McMillan that he had heard that McMillan was part of the union and asked how it was going for him. Questions concerning union status are not per se violation of the Act. Rather, accompanying circumstances must be assessed to determine whether the questioning is coercive. *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (1985). In analyzing these allegations I take into account McMillan's status as an employee-applicant. The Board has held that employee-applicants, like McMillan, are particularly susceptible to the coercive effects of interrogations concerning their union support. *Gilberton Coal Co*., 291 NLRB 344 (1988). I note that Gibbs was the highest ranking official for Aim and had ultimate control over hiring. I also note that the subject matter was raised by Gibbs and was not part of a general conversation initiated by McMillan. I conclude that Aim violated Section 8(a)(1) by coercively interrogating an employee-applicant concerning his support for the union. I dismiss, however, the allegation concerning the impression of surveillance. I note the circumstances here that McMillan was openly a member of the Union and had worked on union projects. It strikes me as unlikely that an employee would then reasonably believe that his union activity was under surveillance. Rather, it is more a prelude to the interrogation that I have concluded was unlawful.

I now address the allegations in the complaint that Aim unlawful refused to hire or consider for hire Shawn McMillan. I have described above how on about July 15 McMillan sought re-employment with Aim and how Aim was hiring during that time period. McMillan supported the Union, Aim knew this, and Aim was hostile to the Union. Moreover, the reason given by Aim to McMillan as to why he was not rehired was false and the reason given at trial, as explained above, was patently exaggerated. I conclude that the General Counsel has established his burdens under *FES* and *Wright Line*. As a former employee McMillan was eligible for rehire under Aim's hiring practice, even if he had been fired for cause. At the trial and in its brief Aim sought to explain why it nonetheless failed to hire or consider hiring McMillan. Relying on Gibbs' testimony, Aim argues that McMillan unlike other former employees that were rehired despite having been fired for cause, McMillan never expressed remorse for having told Aim to "lose my number." But as the General Counsel pointed out, unlike those other employees Aim never broached the matter with McMillan. In any event, Gibbs' testimony in this regard is again wholly incredible. I conclude that by failing to hire and to consider hiring McMillan because he engaged in union activity, Aim violated Section 8(a)(3) and (1).

### *F. Complaint Allegations against Jacobson*

Returning to the facts of the case, on about June 30 Lazaro Campos called Chavez, Jacobson's contact person, and requested that insulators be sent to Aim. That same day as Chavez attempted to fill Aim's request she spoke to Imuris Garcia. Garcia, a friend of Shawn McMillan, told Chavez that McMillan was also looking for work as an insulator.[3] On about July 1 Chavez interviewed Garcia and Marcellino Trujillo and sent them to Aim. Campos interviewed Garcia and Trujillo, hired them and they started work at Aim the next day.

After referring Garcia and Trujillo, Chavez then called McMillan. At the time Chavez called McMillan he was with a friend, Mark Waters; McMillan put the call from Chavez on the speaker phone and Waters was able to hear the conversation. Chavez asked McMillan if he was looking for insulation work that paid $11 per hour and he replied that he was. At this point the evidence becomes contradictory. Initially in his testimony, according to McMillan, after asking about his experience, Chavez asked if he was part of the union; McMillan replied that he was. Chavez said that was all she could do for him right then and the conversation ended. Later in his testimony, in response to my question, McMillan stated that;

> [Chavez] told me that she would look for work and she'll call me back because I told her at the time that I wasn't really sure if I could join Jacobson Staffing Company or go through Aim Royal because of my union status, and she, oh, you're part of the union, and then she kind of said I can't really help you then, and hung up on me.

Based on my observation of McMillan's demeanor, I credit the testimony he gave in response to my question. This testimony is confirmed to some extent by Water's testimony. Waters testified that he recalled an instance when McMillan used the speaker phone feature and remembered that McMillan said he was looking for a job but the person that he was talking to said they would not hire McMillan either because he was or was not a union member, Waters could not recall which it was. According to Chavez, McMillan expressed interest in working but stated that he was in the union and he was not sure if he could work for a nonunion company. Chavez said that if he changed his mind he should call her back. But as described below I have generally not found Chavez to be a credible witness and I do not credit her testimony here either.

#### Analysis

The complaint alleges that on about July 1, Jacobson through Chavez threatened employee-applicants with loss of employment opportunities because of their union activities. I have described above how Chavez told McMillan that because he was part of a union she could not help him find work. This amounted to telling McMillan that he would not be hired because of his union status. Such comments violate the Act. *J & R Roofing Co, Inc.*, 350 NLRB 694, 694–695 (2007). By telling an employee-applicant that he could not be hired because of his union status, Jacobson violated Section 8(a)(1). The complaint alleges that on about July 1 Jacobson unlawfully refused to consider for hire or hire McMillan. I have described above how Chavez called McMillan and inquired whether he wanted to work for Aim but McMillan said he was not really sure if he could join Jacobson or go through Aim Royal because of his

[3] Recall that I have described above how later, on July 15, McMillan applied directly with Aim and Aim unlawfully refused to hire him.

union status. I conclude that McMillan did not apply for work on this occasion and I dismiss this allegation of the complaint.

Returning to the facts, telephone records establish that McMillan called Jacobson on July 2 at 11:45 a.m. but McMillan provided no testimony concerning this second conversation. Rather, McMillan claims that despite the fact that Chavez hung up on him due to his ties with the Union she nonetheless called him back several days later and asked him to come in and fill out paperwork right away. According to Chavez, McMillan called her back and said that the f –ing union was not giving him enough hours so he did not want to be with the f –ing union anymore and that he needed a f –ing job right then, any job, no matter what it paid. In the light of the telephone records, the absence of testimony by McMillan concerning the content of the call, and the unlikelihood that Chavez would hang up on him one day because of his union ties yet call him back inviting him to come in with no change in his union status, I conclude that McMillan called Chavez on July 2 and renounced his ties to the Union and sought employment.

Aim needed more workers so on July 14 Chavez sent Isidro Ortega and Claudio Rendon to Aim; both retained by Aim. On that same day, July 14, Chavez called McMillan and told him to come in and fill out some paperwork right away. Telephone records confirm that the next call between Chavez and McMillan occurred on July 14, when three calls were made; at 8:55 a.m., 9:06 a.m, and 12:05 p.m. McMillan went to Jacobson's office that day and was given paperwork to complete. After completing the paperwork, according to McMillan, Chavez said:

> [H]ow is this going to affect your union status. I asked her what did she mean, and we kind of cut off the conversation right there and simply jumped in and she said, oh, you have to watch the safety (video) and you have to do this, trying to avoid my question.

Chavez then told McMillan to go home to get his social security card and that if he did not return in 20 minutes she would give the job to someone else. McMillan left and then returned with his social security card. After completing the application process Chavez told McMillan to go home, that Aim will call him because there is an interview arranged for him there at about 1 p.m. But after McMillan returned home Chavez called and told him that Aim had backed out and there was no work for him. The foregoing facts are based on the credible portions of McMillan's testimony. In deciding to credit this testimony I have considered Chavez's testimony. According to Chavez she did call McMillan who then came to Jacobson's office and took an application form but did not complete it because he said he was very busy and had to go pick up his kids, again using foul language. McMillan returned to the office later that day and completed the application. Chavez admitted that she told McMillan that he was a good candidate for employment with Aim. According to Chavez, she then contacted Lazaro Campos and told him that she had a good candidate but Campos replied that he was only looking for two workers and he had already hired the first two applicants she had sent earlier that day, sent away another two applicants but that she should keep that employee's name on file for possible future use. According to Chavez, she did not mention McMillan's name to Campos. Chavez then told McMillan that she was sorry but Aim already had enough workers; McMillan got angry, used the f-word and slammed the door on his way out. I again do not credit Chavez's testimony. It struck me as exaggerated and conveniently contrived to suit a litigation strategy; her demeanor was not convincing. McMillan credibly denied saying that he had to pick up his children from school or that he even has a child in school and he denied slamming the door. On the other hand, McMillan also denied that he used the f-word with Chavez and denied that the word was part of his vocabulary. I do not credit this testimony to the extent that it indicates that he never uses the f-word.

Also on July 14, Luis Bolaños and Gustavo Gonzalez appeared at Jacobson's office; they coincidentally arrived around the same time. Both were sent there by Aizu, who told them that Aim was looking for workers to hire through Jacobson. Chavez told Gonzalez, who arrived first, that the company (Aim) had already hired two workers that day and they were going to hire two more. Chavez told Bolaños that they were looking to hire two people to work as insulators. After completing the paperwork Gonzalez and Bolaños went into Chavez's office where she examined the paperwork and asked questions. Bolaños' application indicated that he had worked for Argus, a union employer. Also recall that Bolaños' application was among those that the Union has sent to Aim on June 23 and that Gibbs had retained copies of those applications. Chavez told Bolaños that she wanted to send him for an interview for an insulator position. Bolaños testified that three telephone conversations then ensued; Campos' telephone records confirm this testimony and show that the first call that occurred between him and Jacobson on July 14 occurred at 11:40 a.m., followed by calls at 11:49 and 11:53, about the time that Gonzalez and Bolaños were in Jacobson's office. During one of the calls to Aim Chavez indicated that she had applicants there with insulation experience; she arranged for an interview for Gonzalez at 1:30 p.m.; Chavez marked "1:30" on Gonzalez's application, again confirming Gonzalez's testimony. After more discussion on the telephone Chavez indicated that Aim was not really interested in Bolaños and no interview time was set for him with Aim. That telephone conversation ended, but shortly thereafter Chavez received a telephone call and she then asked Gonzalez who sent him for the job and Gonzalez replied "Angel" but he could not remember the last name. Then he retrieved a business card from his wallet and showed it to Chavez; the card bore the name of Angel Aizu and it indicated that Aizu was an organizer for the Union; Chavez then wrote the word "Union" on his application. Chavez then told the person on the telephone that Angel Aizu from the Union had sent Gonzalez. After Chavez ended the call she told Gonzalez and Bolaños that they were no longer interested in interviewing Gonzalez and the interview was cancelled. Bolaños commented that maybe it was because they worked for the union that they did not want them. Chavez did not reply to that comment but said she was upset because she had to look for more people. Bolaños asked about other work opportunities. Chavez asked if he could drive a fork lift; Bolaños said he did not but could learn. Chavez told Bolaños to call her two or three times a

week if he was still looking for employment. Gonzalez then left the office and called Aizu and told him what had occurred. Aizu suggested that Gonzalez get a copy of the application he had completed. Gonzalez attempted to do so, saying that he needed it to continue to receive unemployment compensation; Chavez did not give him a copy of the application but she did assure him that she would confirm that he sought employment there. Gonzalez and Bolaños each credibly testified that they were not working at the time they sought this employment and would have accepted the position if it had been offered. Afterwards, Bolaños did call Jacobson to see if other work opportunities were available but was not referred for employment.

The facts in the preceding paragraph are based on a composite of the testimony of Gonzalez and Bolaños. The demeanor of both struck me as witnesses trying their best to relate factual information. Their testimony was generally corroborative and consistent with telephone records. Chavez' own writing confirms that a 1:30 appointment was set for Gonzalez and that subject of the "Union" came up during the conversation. Significantly, how would Gonzalez have known that Aim had already hired two workers sent by Jacobson unless Chavez told him? There is no evidence that he could have learned this information from any other source. I have considered the testimony of Chavez and Campos. According to Chavez after examining the applications and interviewing Gonzalez and Bolaños, Chavez informed them that she would send them to Aim for an interview. At some point Chavez wrote "Union" on top of the applications, but she denied that she was presented with Aizu's business card. According to Chavez, in the presence of Bolaños and Gonzalez she then called Campos and told him she had two great candidates for him; Campos said he had hired the first two and did not need any more workers. According to Campos, Chavez called and said she had two other applicants and asked if Aim needed more workers; Campos replied that he did not need any more personnel. According to Chavez, Gonzalez, and Bolaños then said to each other it was probably because they were from the union that Campos did not want to interview them; Chavez told them that she never mentioned the union to Campos so she did not believe that was why Campos did not want to interview them. At the trial Chavez explained that she wrote "Union" on the applications before she spoke to Campos because she considered that a good thing since all applicants with the union had good work histories and the notation "Union" would remind her that these applicants had good work records. But in her pretrial affidavit Chavez stated that she wrote "Union" on the applications after she spoke to Campos and after Gonzalez and Bolaños commented that the reason that Campos did not want to interview them was because of the Union. And Chavez does not credibly explain why she wrote "1:30" on Gonzalez's application. Neither Campos nor Chavez explained why it took three telephone calls for Campos to tell her that he did not need any more workers. For these reasons, and because of their unconvincing demeanor, I do not credit the testimony of Chavez and Campos.

## Analysis

The complaint alleges that on about July 14 Chavez threatened employee applicants with loss of job opportunities because of their union support. The General Counsel relies on the events above concerning Gonzalez and Bolaños where Chavez told them that Aim was no longer interested in hiring Gonzalez after he disclosed that the Union had sent them to seek employment. Here, the intimate connection of the Union with Chavez' announcement to the employees that their interviews were canceled would reasonably tend to indicate to them the cancellation was because of the Union. By telling employee-applicants that they lost employment opportunities because of their support for the Union, Jacobson again violated Section 8(a)(1). Next the complaint alleges that on about July 14 Chavez unlawfully interrogated employee-applicants. I concluded above that Chavez did ask McMillan how applying for work with Jacobson would affect his union status but then changed the subject when McMillan asked why it mattered. I recognize that McMillan himself raised the issue of his union affiliation in earlier conversations with Chavez when he expressed concern over whether he could both maintain that affiliation and work with Jacobson and Aim. On the other hand, the Board has held that employee-applicants, like McMillan, are particularly susceptible to the coercive effects of interrogations concerning their union support. And Chavez had earlier unlawfully threatened McMillan concerning his union status. Finally, Chavez was the highest Jacobson official at the location and she had the authority to decide whether or not to refer McMillan for employment. Under these circumstance I conclude that by coercively interrogating an employee-applicant concerning his union status, Jacobson violated Section 8(a)(1). *Zarcon, Inc.*, 340 NLRB 1222 (2003). The complaint alleges that Jacobson refused to hire or consider for hire Bolaños, Gonzalez, and McMillan.[4] As to the allegation that Jacobson refused to *hire* these applicants, the General Counsel concedes in his brief that "Workers are not hired by Jacobson until they have received a commitment from the client to retain the specific employee." Because Aim never hired these workers it follows that Jacobson has shown that it would not have hired these employees even if they had not been union supporters. I dismiss this allegation. The allegation that Jacobson refused to *consider* these applicants for employment is not supported by the evidence. To the contrary, the evidence shows that Jacobson fully considered them for hire and was ready to refer them to Aim. I dismiss this allegation too. The General Counsel cites *Capitol-EMI Music*, 311 NLRB 997, 1000 (1993), enfd. 23 F.3d 399 (4th Cir. 1994), arguing that under certain circumstances both employers in a joint-employer relationship may be liable for unfair labor practices committed by only one. That is indeed correct. But the problem here is that there is no evidence that Aim and Jacobson were joint employers during the prehire stage. The precise stipulation received into evidence here is:

[4] As clarified at the hearing, the General Counsel does not allege that Aim independently violated the Act by rejecting these applicants. In his brief the General Counsel does not argue that Aim did so. Rather, he relies solely on a "joint employer" theory that I reject for reasons described below. And even initially, before the clarifications the complaint specified that the word "Respondents" referred to Aim and Jacobson only in their capacity as "joint employers."

> Respondent Jacobson is a joint employer with Respondent Aim Royal with respect to those individuals that were assigned to the Aim Royal workplace.

None of these individuals were ever assigned to Aim's workplace. I therefore reject the General Counsel's argument.

Returning once again to the facts of this case, on July 15 Aizu went to Jacobson with an application he had received from Chavez the day before. On the application he listed his name as Angel A. Garcia; Garcia is his mother's maiden name. Aizu did this to avoid being identified as a union agent. Aizu told Chavez that he wanted to work as an insulator. Chavez accepted the application and asked Aizu to follow him to an office area. As they were walking Chavez asked Aizu if he belonged to the Union. Aizu answered "No." He then asked Chavez if it mattered and Chavez replied "No." Chavez explained that she asked the question because the union workers had more experience. Chavez also asked Aizu some questions about his background and experience. Chavez commented that Aizu was already making good money after Aizu mentioned that he was making $22 per hour. Chavez said that she had only filled insulator jobs that were paying $11 per hour. Chavez said that she did not have jobs right then, that she liked Aizu's background and skills, and that he should call her three times a week to see if any jobs became available. After interviewing Aizu, Chavez wrote "not with union" on the second page of Aizu's application. After the interview Aizu did not call Chavez as she had requested. However, on about July 31 Aizu returned to Jacobson's office accompanied by about seven others wearing union tee shirts. Chavez told Aizu that he was already in the system and did not have to be there again and reminded him that when she spoke to him earlier she asked him to call her three times a week but he never did call. The others completed applications. There is no allegation in the complaint concerning the July 31 incident. The facts in this paragraph are based on Aizu's credible testimony, his demeanor appeared convincing and his recitation of events seemed to flow naturally and without exaggeration.

### Analysis

The complaint alleges that on July 15 Chavez again interrogated employee-applicants concerning their union activity. In support of this allegation the General Counsel relies on the interview of Aizu by Chavez. As more fully described above, during that interview Chavez asked Aizu if he was in the union or part of a union and Aizu replied that he was not. Aizu asked if that mattered; Chavez replied that it did not, but that if you worked with the union you have more experience. Here, unlike other instances of coercive interrogation described above, Chavez coupled her question with the assurance that his union status did not matter to her and explained that she asked the question because she felt union workers had more experience. Under these circumstances I cannot conclude that the questioning had the tendency to be coercive. In any event any finding here is cumulative and does not alter the remedy in this case. I dismiss this allegation. Finally, the complaint alleges an unlawful failure to hire Aizu or to consider him for hire. For reasons described in the preceding "Analysis" section, I dismiss this allegation. Moreover, Chavez informed Aizu, as she had informed others, to call her three times a week to show a continuing interest. He admittedly failed to do so.

### CONCLUSIONS OF LAW

1. Respondent Aim has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Maintaining overly broad work rules that prohibit employees from leaving the work area or jobsite without permission.

(b) Coercively interrogating an employee-applicant concerning his support for the union.

2. Respondent Aim has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act by refusing to consider for hire and by refusing to hire Jose Gurrola and Shawn McMillan because they engaged in union activity.

3. Respondent Jacobson has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) By telling an employee-applicant that he would not be hired because of his union status.

(b) By coercively interrogating an employee-applicant concerning his union status.

(c) By telling employee-applicants that they lost employment opportunities because of their support for the Union.

### REMEDY

Having found that Respondent Aim has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because of the significant number of employees that speak Spanish, I shall require that the "Notices to Employees" be posted both in English and Spanish. I have concluded that Respondent Aim has maintained unlawful rules in its employee handbook; to remedy this violation I apply *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005). The General Counsel argues that notices to employees correcting the rules should be in both Spanish and English, but I deny this request. First, the General Counsel cites no case authority to support this contention. I note that there is no evidence that Aim's employee handbook is provided to employees in Spanish as well as English. I further note that I require that the Notices to Employees be posted in Spanish as well as English. Under these circumstances I believe that this violation will be fully remedied.

Having found that Respondent Aim discriminatorily refused to consider for hire and hire Jose Gurrola and Shawn McMillan, Respondent Aim must offer them instatement and make them whole for any loss of earnings and other benefits. The duration of their backpay period shall be determined in accordance with *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007). Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons*, 283 NLRB 1173 (1987). The instatement of discriminatees is subject to defeasance if, at the compliance stage, the General Counsel fails to carry his burden of going forward with evidence that they would still be em-

ployed by Respondent Aim if he had not been the subject of discrimination. *Oil Capitol Sheet Metal, Inc.*, supra at 1351.

Having found that the Respondent Jacobson has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Because of the number of Spanish speaking employees, I shall require that the Notices be posted both in English and Spanish.

[Recommended Order omitted from publication.]